92-1525

Supreme Court, U.S.
FILED
MAR 15 1993
OFFICE OF THE CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1992

Larry Moore and Leon Mitchell,
Petitioners,

v.

Metropolitan Waste Control Commission, et al.,
Respondents

On Petition for Writ of Certiorari To
The United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether co-plaintiffs in a class action should have the opportunity to be class representatives.

2. Whether co-plaintiffs who have been denied an opportunity to be class representatives in a class action may appeal from an order granting final approval of the class settlement without intervening in the lawsuit.

LIST OF PARTIES TO THE PROCEEDING BELOW

The parties and their alignment in the United States District Court for the District of Minnesota and in the Eighth Circuit Court of Appeals are as follows:

Timothy R. Franklin;
Plaintiff-Appellee,
Larry Moore;
Plaintiff-Appellant,
Leeroy J. Neal, et al.,
Plaintiff-Appellee,
Leon Mitchell;
Plaintiff-Appellant,
Terry M. Mitchell,
Plaintiff-Appellee,
v.
Metropolitan Waste Control Commission, International Union of Operating Engineers, The Local 35, International Brotherhood of Electrical Workers; Pipefitters Local 55, Machinist District, Lodge 77, Painters and Allied Trade Union, Local 61, Bricklayers Union, Local 1, American Federation of State, County and Municipal Employees, Local 668; Metropolitan Waste Control Commission Management Association,
Defendants - Appellees.

Only respondent Metropolitan Waste Control Commission moved to dismiss petitioners' appeal to

the United States Court of Appeals for the Eighth Circuit. Nevertheless, all other parties are deemed respondents and have been served with this petition.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING BELOW ii

TABLE OF CONTENTS iv

APPENDIX INDEX v

TABLE OF AUTHORITIES vii

INTRODUCTION 1

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

I. The lower courts' refusal to adjudicate co-plaintiffs' claimed rights to serve as class representatives is a denial of procedural due process and violates the Federal Rules of Civil Procedure for the conduct of class actions. 3

II. The disallowance of co-plaintiffs' appeal from an order granting final approval to a class action settlement is an unprecedented expansion of the holding in *Marino v. Ortiz*. 5

A. As parties to the class action, petitioners are not required to intervene. 5

B. The Court should resolve a conflict in the circuits regarding standing to appeal from denials of objections made by nonparties to class action settlements. 6

C. The order approving the settlement is the final decision under traditional criteria. 8

D. The order alternatively satisfies the requisites of a collateral order from which an appeal may be taken. . . . 9

CONCLUSION 10

APPENDIX INDEX

A. Opinion of the Court of Appeals, dated November 3, 1992 . . . . . A-1

B. Memorandum Opinion and Order of the District Court, dated July 31, 1992 . . . . . B-1

C. Order of the Court of Appeals, dated December 15, 1992, Denying Petition for Rehearing C-1

B-1

C-1

TABLE OF AUTHORITIES

Cases

Ace Heating & Plumbing Co. v. Crane Co.,
453 F.2d 30 (3d Cir. 1971) 7

Armstrong v. Board of Sch. Directors,
616 F.2d 305, 327 (7th Cir. 1980) 7

Cohen v. Beneficial Industrial Loan Corp.,
337 U.S. 541 (1949) 9

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) . . 9

Croyden Assocs. v. Alleco, Inc.,
969 F.2d 675 (8th Cir.) *cert. denied*,
61 U.S.L.W. 3580, 92 WL 303337,
February 22, 1993 . . . . . 5, 7

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) . . . 9

Guthrie v. Evans, 815 F.2d 626, 627 (11th Cir.
1987) 5, 7

*In re General Motors Corp. Engine Interchange
Litigation*, 594 F.2d 1106, 1117-1120 (7th Cir.),
cert. denied, 444 U.S. 870 (1979) 8

Marino v. Ortiz, 484 U.S. 301, 304 (1988) 5

Marshall v. Holiday Magic, Inc. 550 F.2d 1173 (9th Cir. 1977) 7

Patterson v. Stovall, 528 F.2d 108, 109 n. 1 (7th Cir. 1976) 7

Re Temple, 851 F.2d 1269 (11th Cir. 1988) 4, 7

Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970) 7

Walker v. City of Mesquite, 858 F.2d 1071 (5th Cir. 1988) 7

Statutes and Rules

16 Stat. 144 2

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 2

42 U.S.C. § 2000, *et seq.* 2

78 Stat. 253 2

Civil Rights Act of 1866 2

Fed. R. Civ. P. 5 . . . . . 4, 6

Minn. Stat. § 361.01, *et seq.* 2

Minnesota Human Rights Act 2

Title VII of the Civil Rights Act of 1964 2

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1992

Larry Moore and Leon Mitchell,
Petitioners,

v.

Metropolitan Waste Control Commission, et al.,
Respondents

On Petition for Writ of Certiorari To
The United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioners respectfully ask that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on November 3, 1992, dismissing petitioner's appeal and denying a writ of mandamus, thereby effectively affirming the district court's grant of final approval to the class action from which petitioners have been excluded.

OPINIONS BELOW

The district court entered an order granting final approval of a class action settlement in an unreported memorandum and order dated July 31, 1992 (Appendix B). The court of appeals dismissed petitioners' appeal in an unpublished opinion dated November 3, 1992 (Appendix A); the petition for rehearing was denied on December 15, 1992 (Appendix C).

JURISDICTION

On November 3, 1992 the United States Court of Appeals for the Eighth Circuit entered an opinion (App. A) dismissing petitioner's appeal from the district court's order granting final approval of a class action settlement; the court of appeals denied a timely filed petition for rehearing (App. C). Jurisdiction to review the final decree of the court of appeals by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents the issue whether co-plaintiffs in a class action alleging racial discrimination can be excluded as class representatives without any hearing on the issue of their status. The court of appeals did not reach the substantive issue because it found that petitioners lacked standing to appeal.

Petitioners, Leon Mitchell and Larry Moore, are co-plaintiffs in a class action lawsuit that they commenced with five other plaintiffs. The lawsuit is brought to remedy racial discrimination in employment as prohibited by Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. § 2000, *et seq.*, as amended; the Civil Rights Act of 1866, 16 Stat. 144, 42 U.S.C. § 1981, as amended; and the Minnesota Human Rights Act, Minn. Stat. § 361.01, *et seq.*

Petitioners' amended complaint in the same lawsuit, interposed for the purpose of separate representation, alleges identical class averments as those contained in the original complaint (as noted in the order dismissing the appeal, Appendix A-3). The district court recognized that petitioners are named plaintiffs in this action. (Appendix B-4, B-5.) The other plaintiffs were permitted to settle their claims as class representatives. Petitioners were not afforded an opportunity to settle their claims as class representatives. The documents submitted in support of respondents' motion for preliminary approval were not served upon co-plaintiffs Mitchell and Moore. Indeed,

the supporting documents were filed with the clerk of court only one day before the motion hearing. Thus, the court gave preliminary approval to the class action settlement without allowing petitioners an opportunity to object to the preliminary approval. The court of appeals noted the failure to give notice to petitioners of the hearing for preliminary approval. (Appendix A-3.)

The district court ruled that petitioner s did not have standing to object to the final approval because they had opted out of the class. The court of appeals dismissed petitioner s' appeal from the order granting final approval on the ground that co-plaintiffs had not intervened in the lawsuit for the purpose of objecting to their exclusion as class representatives.

REASONS FOR GRANTING THE WRIT

I. The lower courts' refusal to adjudicate co-plaintiffs' claimed rights to serve as class representatives is a denial of procedural due process and violates the Federal Rules of Civil Procedure for the conduct of class actions.

Petitioners' objections regarding their exclusion as class representatives should have been considered by the court at the hearing on preliminary approval. Instead, deferring notice to petitioners until the hearing on final approval necessitated that petitioners provisionally opt-out of the class in order to protect their right to pursue their claims, whether or not they would

be allowed to act as class representatives. Petitioners opted-out of the class only if the court denied them the right to object to the settlement. Their provisional opt-out was then used as a reason to deny them the right to have their objections heard.

The right to serve as class representatives is a valuable right. The claims of class representatives are settled on a more favorable basis than class members. The claims of class members are limited to a maximum of $30,000 per person, whereas the claims of class representatives are settled on an average of $38,000 each.

Respondents' failure to give co-plaintiffs notice of the hearing on the motion for preliminary approval deprived Mitchell and Moore of their due process rights to appear at that hearing and object to the proposed settlement on the ground that they were excluded as class representatives. The lower courts did not address the merits of petitioners' due process contentions.

The settling parties were required by Fed. R. Civ. P. 5 to give notice of the motion to the co-plaintiffs: "[E]very . . . written notice shall be served upon each of the parties." Failure to do so was a denial of co-plaintiffs' due process rights, because it deprived the co-plaintiffs of an opportunity to timely assert their objection to the proposed settlement without being required to protect their interests by opting out of the proposed settlement. *Cf. Re Temple,* 851 F.2d 1269 (11th

Cir. 1988) (failure to give notice of certification hearing is denial of due process).

II. The disallowance of co-plaintiffs' appeal from an order granting final approval to a class action settlement is an unprecedented expansion of the holding in *Marino v. Ortiz.*

A. As parties to the class action, petitioners are not required to intervene.

The rule that nonparties to a class action must intervene to have standing to object and appeal does not apply to co-plaintiffs in the class action.
The cases relied upon by the court of appeals are not controlling; moreover, the invoked cases are inapposite. *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) involved a challenge to a settlement by individuals who were not parties to the underlying litigation. *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675 (8th Cir.) *cert. denied* 61 U.S.L.W. 3580, 92 WL 303337, February 22, 1993, dealt with an unnamed class member whose standing contention was premised upon its filing of objections to the proposed settlement and its appearance at the fairness hearing. Likewise, *Guthrie v. Evans*, 815 F.2d 626, 627 (11th Cir. 1987) specifically limited its holding to "a class member who is not a named plaintiff."

The foregoing cases do not control where notice has not been provided to parties entitled to notice. The rule requiring intervention by nonparties has no

application to a suit where co-plaintiffs who have opted out from the class object at the fairness hearing because they have not been afforded the right to voice their objections at the preliminary approval hearing, especially where there has been no prior certification of the class. Plaintiffs' appeal is premised, in part, on the failure to give them the notice of the preliminary approval hearing to which they were entitled, under the rules of civil procedure, as co-plaintiffs. Fed. R. Civ. P. 5. No precedent can be cited where co-plaintiffs have been required to intervene in their own lawsuit to assert their right to be given notice of a proposed settlement of their class action.

Petitioners' opt-outs from the class should not deprive them of standing, as named plaintiffs, to object to the failure to give them a prior opportunity to be included as class representatives. To require plaintiffs to intervene in their own lawsuit to object to a proposed class settlement is unprecedented and anomalous.

B. The Court should resolve a conflict in the circuits regarding standing to appeal from denials of objections made by nonparties to class action settlements.

The district court found that "the objectors before this court are non parties to this action . . . ." (Appendix B-3.) This holding was premised on petitioners' provisional opt-out, which was necessitated by

the failure to give notice of the motion for preliminary approval. Assuming, arguendo, that petitioners are nonparties, this court should resolve a conflict in the circuits regarding the appealability of class action orders by nonparties.

The circuits are divided regarding the appealability of class action orders by nonparties. The Fifth Circuit, in *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988), the Eighth Circuit, in *Croyden*, and the Eleventh Circuit, in *Guthrie*, have held that a nonparty does not have standing to appeal the final judgment in a class action. *Cf. Re Temple*, 851 F.2d 1269 (11th Cir. 1988) (review granted from order certifying a mandatory class without providing notice to prospective class members). By contrast, the Seventh Circuit has recognized the right of an unnamed class member-objector to appeal from a class action judgment. *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970); *Armstrong v. Board of Sch. Directors*, 616 F.2d 305, 327 (7th Cir. 1980); *Patterson v. Stovall*, 528 F.2d 108, 109 n. 1 (7th Cir. 1976) (objecting class members have standing to appeal settlement agreement). The Third Circuit, in *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971), and the Ninth Circuit, in *Marshall v. Holiday Magic*, Inc. 550 F.2d 1173 (9th Cir. 1977) have allowed appeals from . class action judgments without intervention; the issue of standing was not raised in those cases, although the courts recognized the right of class members to exclude themselves from the class.

C. *The order approving the settlement is the final decision under traditional criteria.*

The district court's order (Appendix B) put an end to the class action. Approval of a complete settlement ends the class action. Mitchell and Moore objected to the settlement, in part, because they were not given the opportunity to settle their claims as class representatives on the same basis as their co-plaintiffs, who were treated more favorably than class members. Petitioners were denied that opportunity because the settling parties failed to give notice of the hearing at which the proposed settlement was granted preliminary approval. Thus, Mitchell's and Moore's first opportunity to object to the settlement came at the hearing for final approval, where their objections were premised upon the preceding lack of notice.

The pendency of Mitchell's and Moore's individual claims does not detract from the finality of the order approving the class action. The Fifth Circuit has permitted an appeal from an order partially approving a settlement of a class action. *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1117-1120 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979) (allowing appeal from an order approving settlement as to one subclass). In the present case, the settlement order approved all class claims. Nothing more remains to be done regarding the class claims. The issues raised by appellants in their objections to the class settlement will not be further addressed by the court.

D. The order alternatively satisfies the requisites of a collateral order from which an appeal may be taken.

The order approving the class settlement is collateral to the merits of co-plaintiffs' individual claims. Co-plaintiffs have been denied due process by refusal to allow them to raise the issue whether they should have been allowed to pursue their claims as class representatives in the class action. That issue is separable from, and collateral to, the substantive rights asserted in their discrimination action. Denial of due process is too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred. Therefore, the requisites for appeal under the collateral order doctrine are satisfied. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The collateral order doctrine is applicable in class actions. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The order approving the settlement conclusively determines that co-plaintiffs are not entitled to seek class representation status, thereby resolving that important issue, which is completely separate from the merits of the claims and is effectively unreviewable on appeal from a final judgment in their individual lawsuits. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should summarily remand the case to the district court with instructions to vacate the final approval of the class settlement and consider petitioners' objections to preliminary approval based upon their exclusion as class representatives.

Date: March 15, 1993

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3050

Timothy R. Franklin;	*	
Appellee,	*	
Larry Moore;	*	
Appellant,	*	
Leeroy J. Neal,	*	
Fleurette C. Price,	*	
Appellees,	*	Appeal from the
Leon Mitchell;	*	United States
Appellant,	*	District Court
Terry M. Mitchell,	*	for the
Anthony Kilgore,	*	District of Minnesota
Appellees,	*	
v.	*	
Metropolitan Waste	*	
Control Commission,	*	
International Union of	*	
Operating Engineers,	*	
The Local 35, International	*	
Brotherhood of Electrical	*	
Workers; Pipefitters Local	*	
55, Machinist District,	*	
Lodge 77, Painters and	*	
Allied Trade Union, Local	*	
61, Bricklayers Union,	*	

Local 1, American Federation of State, County, Municipal Employees, Local 668; Metropolitan Waste Control Commission Management Association, *

Appellees. *

Filed: November 3, 1992

Before McMILLIAN, Circuit Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

ORDER

Larry Moore and Leon Mitchell appeal from a final order entered in the District Court for the District of Minnesota approving the settlement of a class action suit pursuant to Fed. R. Civ. P. 23(e). Franklin v. Metropolitan Waste Control Comm'n, Civil File No. 3-88-784 (D. Minn. Aug. 3, 1992) (memorandum and order). Metropolitan Waste Control Commission (hereinafter employer) has filed a motion to dismiss the appeal on the grounds that appellants lack standing to appeal. Appellants have filed a response in opposition to the motion to dismiss and an application for writ of mandamus. For the reasons discussed below, we grant

the motion to dismiss and deny the application for writ of mandamus.

The underlying class action suit was filed in 1988 and charged the employer and several unions with employment discrimination on the basis of race in violation of federal and state law. Appellants were original named plaintiffs. Class counsel and counsel for defendants began informal settlement negotiations. In the meantime, appellants became dissatisfied with class counsel and hired their own attorney. Through counsel, appellants filed a separate amended complaint (nearly identical to the original complaint) and engaged in separate settlement negotiations. Appellants later became dissatisfied with counsel and conducted settlement negotiations pro se. Class counsel continued to represent the plaintiff class and also continued negotiations on behalf of the plaintiff class.

In June 1990 Moore settled his claims against defendants. Because Moore had filed a Chapter 7 petition, the settlement proceeds became part of the bankruptcy estate. Mitchell has not settled his claims against defendants.

In the meantime, the parties reached agreement on a proposed settlement agreement. Appellants were not sent notice of the hearing on the motion for preliminary approval of the proposed settlement agreement. The district court granted preliminary approval of the proposed settlement agreement and

directed that notice of the fairness hearing and information about opting out be sent to all members of the class. Notice was sent to all class members, including appellants; appellants filed notices electing to opt out of the class. The district court held a fairness hearing. Appellants and others filed objections to the proposed settlement agreement. The district court concluded that appellants lacked standing to object to the proposed settlement because they had opted out of the class. The district court then approved the proposed settlement agreement which, among other things, established a settlement fund and a fund to monitor and administer the agreement, included specific injunctive relief, and provided for payment by the employer of attorney's fees, costs and expenses to class counsel. Appellants filed a notice of appeal.

We agree with the employer that appellants lack standing to appeal the district court order approving the settlement agreement. Although appellants were original named plaintiffs, they later opted out of the class and thus are no longer members of the class. (In addition, as noted above, appellant Moore settled his claims against defendants.) Because appellants are not parties to the underlying class action, and they did not seek to intervene either in the district court or in this court, they lack standing to appeal. Cf. Marino v. Ortiz, 484 U.S. 301, 304 (1988) (per curiam) (only parties, or those that properly become parties, may appeal adverse judgment); Croyden Assocs. v. Alleco, Inc., 969 F.2d 675, 678-80 (8th Cir. 1992) (absent

intervention, unnamed class member lacks standing to appeal order approving settlement agreement between named parties of class action); Guthrie v. Evans, 815 F.2d 626, 627 (11th Cir. 1987) (individual class member who is not a named plaintiff does not have standing to appeal).

Accordingly, the motion to dismiss the appeal for lack of jurisdiction is granted. The application for a writ of mandamus is denied.

A true copy.

Attest: s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Timothy R. Franklin et. al,
Plaintiffs,
v.
Metropolitan Waste Control Commission, et. al.,
Defendants.

Civil File No. 3-88-784

MEMORANDUM AND ORDER

INTRODUCTION

This matter is before the court on the parties' motion for final approval of the Settlement Agreement. On June 5, 1992, this court entered an Order granting preliminary approval to the parties' proposed Settlement and Consent Decree and Notice to the classes. For the following reasons the Settlement and Consent Decree is approved in all respects.

DISCUSSION

On June 5, 1992, this court entered an order granting preliminary approval to the proposed Settlement Agreement and Consent Decree and providing for notice to class members. Since that time

several letters of objection have been received by the court. The court discusses the objections below.

A. Objections by former class members Leon Mitchell and Larry Moore

On July 10, 1992, plaintiffs and class members Leon Mitchell and Larry Moore filed documents with the court indicating objections to the proposed settlement. Leon Mitchell and Larry Moore, have opted-out, are no longer class member and therefore have no standing to object.

Federal Rule of Civil Procedure 23(e) requires that notice of any proposed settlement of a class action be given to "all members of the class in such manner as the court directs." The plain language of Rule 23(e) clearly contemplates allowing only class members to object to settlement proposals. Gould v. Alleco, Inc. 883 F.2d 281 (4th Cir. 1989); Jenson v. Continental Financial Corp., 591 F.2d 477, 482, n.7 (8th Cir. 1979). Settlements are to be encouraged, and therefore it follows that to routinely allow non-class members to inject their concerns via objection at the settlement stage would tend to frustrate this goal. Gould, at 284. The Gould court held that non-class members have no standing to object, pursuant to a Rule 23(e) notice directed to class members, to a proposed class settlement. Gould, Id. The denial of standing is likewise supported by the recent Eighth Circuit opinion

in Croyden Associates v. Alleco, Inc., __ F.2d ___ WL 158565 (8th Cir. July 13, 1992).

In Croyden, the Eighth Circuit dealt with the issue of standing with respect to written objections by an unnamed class member. The court rejected the unnamed plaintiff's appeal for of lack of standing. While the objectors in Croyden were unnamed plaintiffs, the court's reasoning in that decision is nonetheless applicable to the facts of this case. For example, the Croyden court relied on the holding in Marino v. Ortiz, 484 U.S. 301 (1988) in which a consent decree approving the settlement of a Title VII lawsuit was challenged by individuals who were not parties to the underlying litigation. The Croyden court quoted the following language from the Marino decision:

> [W]e hold that because petitioners were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal from the consent decree approving that lawsuit's settlement... We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable. Croyden, at page 8, citing Marino, 484 U.S. at 304.

Similarly, the objectors before this court are non parties to this action and therefore lack standing to object.

Nonetheless, the court will briefly address the objections.

Larry Moore and Leon Mitchell argue that the have been unfairly excluded from settlement negotiations in this matter. Mitchell and Moore opted-out of the settlement and elected to pursue their own remedies against the Metropolitan Waste Control Commission. Moore and Mitchell were original named plaintiffs in this lawsuit and were represented by class counsel, Sprenger and Lang. Effective February 13, 1990, Mitchell and Moore dismissed class counsel. They then attempted to negotiate settlements directly with Metropolitan Waste. In April 1990, Mitchell and Moore retained Attorney Thomas Wilson to separately represent them in their claims against Metropolitan Waste. Two weeks later Moore and Mitchell dismissed Wilson and proceeded in the litigation pro se. By signature dated June 11, 1990, Moore accepted a settlement offer with Metropolitan Waste paying $15,000 in exchange for a full and final release of all claims against Metropolitan Waste. At the time of this settlement, Moore was in Chapter 7 bankruptcy proceedings. The settlement funds ultimately became part of the bankruptcy estate. Mitchell, on the other hand, has not accepted a settlement from the Metropolitan Waste, nonetheless he similarly opted-out of the class pursuing remedies independent of the interest of the class.

* * *

C. Settlement Approval

The court has reviewed the terms of the proposed Consent Decree and considered the memoranda and arguments of counsel in support thereof, the objections to the Consent Decree and the argument of the parties opposing the Consent Decree, and the affidavits establishing the publication and mailing of Notice to the classes, and further based upon all of the files, records, and proceedings herein, and the foregoing discussion, the court makes the following:

FINDINGS OF FACT

1. The parties have fully complied with the terms of the court's Order of June 5, 1992, directing individually mailed Notice to class members whose addresses could be ascertained with reasonable diligence and directing that another form of published Notice appear on two separate occasions in newspapers of general circulation in the Minneapolis-St. Paul metropolitan area covering the area of operations of defendant Metropolitan Waste Control Commission.

2. In response to the Notice from the court, the Clerk of Court has received two timely filed opt-outs from the settlement from class members Larry Moore and Leon Mitchell, both of whom are also named plaintiffs in this civil action.

3. In response to the Notice from the court, the Clerk of Court further has received two timely filed objections to the settlement, one from Larry Moore and one from Leon Mitchell. Neither Larry Moore nor Leon Mitchell has standing to object to the proposed Consent Decree because they have opted-out and are not bound by the terms of the settlement.

4. The formula set out in the Consent Decree at pages 13-15 for distribution of the settlement proceeds is adequate to fairly inform class members of the basis upon which monetary awards are to be made under the Consent Decree.

* * *

6. There is no evidence presented from which to conclude that qualified non-class members will not be as fairly treated by the procedures in the Consent Decree as are class members.

* * *

9. All of the files and records in this action are specifically made part of the record upon which this Order is based.

CONCLUSIONS OF LAW

1. The Notice given to members of the classes was fair and adequate and in accord with the

requirements of Rule 23, Federal Rules of Civil Procedure.

2. Larry Moore and Leon Mitchell do not have standing to assert an objection to the settlement since they opted-out and are not bound as other members of the classes established by the court's Order of June 5, 1992, and their objections are, therefore, overruled for lack of standing. Moreover, the objections of Messrs. Moore and Mitchell are not sufficiently meritorious in comparison to the benefits to the settlement classes.

4. The Consent Decree is in all respects a fair, reasonable, and adequate compromise of this litigation in accord with Rule 23, Federal Rules of Civil Procedure, on behalf of the classes whose interests are affected by its terms.

5. The Consent Decree is in all respects a fair, reasonable and adequate compromise of this litigation and does not unfairly affect the interests of non-class members who were at all times fairly and adequately protected by competent representation during the litigation and in the settlement negotiation process.

6. The various deadlines established in the Consent Decree shall be measured from thirty (30) days after the date this Order is signed.

Accordingly,

IT IS HEREBY ORDERED that the proposed settlement agreement and consent decree is approved.

Dated: July 31, 1992

s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3050MNST

Timothy R. Franklin;	*	
Plaintiffs - Appellees,	*	
Larry Moore;	*	
Plaintiffs - Appellants,	*	
Leeroy J. Neal, et al.,	*	Appeal from the
Plaintiffs - Appellees,	*	United States
Leon Mitchell;	*	District Court
Plaintiffs - Appellants,	*	for the
Terry M. Mitchell, et al.,	*	District of Minnesota
Plaintiffs - Appellees,	*	
vs.	*	
Metropolitan Waste Control Commission, et al.,	*	
Defendants-Appellees.	*	

Appellant's petition for rehearing has been considered by the Court and is denied.

December 15, 1992

Order Entered at the Direction of the Court:
s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
APR 14 1993
OFFICE OF THE CLERK

No. 92-1525

In the

Supreme Court of the United States

October Term 1992

LARRY MOORE and LEON MITCHELL,
Petitioners,

v.

METROPOLITAN WASTE CONTROL COMMISSION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether class members who were once plaintiffs in a class action, but have opted out of the class settlement to pursue their own remedies in district court, have standing to appeal the district court's approval of the class settlement agreement.

LIST OF PARTIES TO THE PROCEEDING BELOW

The petitioners omitted some of the parties to the proceedings below. A full list of the parties and their alignment in the United States District Court for the District of Minnesota and in the Eighth Circuit Court of Appeals are as follows:

Timothy R. Franklin,
Plaintiff-Appellee
Larry Moore,
Plaintiff-Appellant
LeeRoy J. Neal, Fleurette C. Price,
Plaintiffs-Appellees
Leon Mitchell,
Plaintiff-Appellant
Terry M. Mitchell, Anthony Kilgore,
Plaintiffs-Appellees

v.

Metropolitan Waste Control Commission; International Union of Operating Engineers - Local 35; International Brotherhood of Electrical Workers; Pipefitters - Local 55; Machinist District - Lodge 77; Painters and Allied Trade Union - Local 62; Bricklayers Union - Local 1; and the American Federation of State, County, Municipal Employees - Local 668; Metropolitan Waste Control Commission Management Association,
Defendants-Appellees

TABLE OF CONTENTS

QUESTION PRESENTED i

THE PARTIES ii

TABLE OF CONTENTS iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT..... 2

ARGUMENT 2

CONCLUSION 5

STATEMENT OF THE CASE

The issue in this case is whether two former plaintiffs in a class action suit who rejected representation by class counsel, filed separate complaints and opted out of the class settlement have standing to challenge that settlement.

Petitioners Moore and Leon Mitchell were plaintiffs, along with others, in a race discrimination class action complaint filed in 1988. Pet. A-3.[1] During negotiations of a class settlement, and before any class was certified, Moore and Mitchell decided to pursue their own actions. Id. In February of 1990, they dismissed class counsel and retained their own attorney who filed a new complaint on their behalf and attempted to settle their claims. Id. Moore and Mitchell subsequently became dissatisfied with that attorney and began negotiating with the employer-defendant pro se. Moore settled his claim in June of 1990. Id.

In the meantime, the parties reached a settlement in the class action and the district court granted preliminary approval of a consent decree. Notice of the fairness hearing and procedures for opting out were sent to all class members including petitioners. Pet. A-4. The petitioners opted out of the class settlement, but also raised objections to the consent decree at the fairness hearing. Pet. B-4.

The district court held that the petitioners did not have standing to object to the consent decree since they had opted out of the class settlement and were not prevented from pursuing their own individual actions. Pet. B-3. The court nevertheless considered and rejected petitioners' objections to the decree. Pet. B-4. The district court approved of the consent decree and class settlement by order dated July 31, 1992. Pet. B-8.

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[1] Citations are to the petitioners' Appendix.

Petitioners appealed the approval of the class settlement to the Eighth Circuit Court of Appeals. The Eighth Circuit dismissed the appeal, holding that the petitioners lacked standing to appeal the class settlement after opting out of the class covered by the agreement. Pet. A-1-5.

SUMMARY OF THE ARGUMENT

The court of appeals correctly held that the petitioners lacked standing to appeal approval of a class settlement that did not affect them because they opted out of the class settlement.

ARGUMENT

I. THE PETITIONERS LACKED STANDING TO APPEAL BECAUSE THEY OPTED OUT OF THE CLASS SETTLEMENT

Petitioners have no stake in the outcome of an appeal and thus have no standing. To have standing to appeal a party must be aggrieved by a district court's order, Estate of Bishop v. Betchel Power Corp., 905 F.2d 1272, 1276 (9th Cir. 1990), and have a direct financial stake in the appeal. Morrison-Knudson Co. v. CHG Int'l, Inc., 811 F.2d 1209, 1214 (9th Cir. 1987), cert. dismissed, 488 U.S. 935 (1988). To have standing to appeal a class settlement, a party must be affected by its terms. City of Inglewood v. Unnamed Citizens, 508 F.2d 1283, 1285 (9th Cir. 1974); Utility Contractors Association of New Jersey, Inc. v. Toops, 507 F.2d 83, 85-86 (3d Cir. 1974). Only class members, i.e. those governed by the class settlement, have standing to object to the settlement. Gould v. Alleco, Inc., 883 F.2d 281, 284 (4th Cir. 1989), cert. denied, 493 U.S. 1058 (1990).

The petitioners do not dispute that they discharged class counsel, hired other counsel, filed a separate complaint and opted out of the class settlement. They are in no way adversely affected because other people settled their own claims. Their assertions that if they had stayed in the class case, and if they had been determined to be adequate class representatives, they would have made more money in the settlement is pure conjecture.[2] Petitioner Mitchell is free to settle or litigate his claim for whatever it is worth. Petitioner Moore settled his claims long before the class settlement was approved. Petitioners may regret past decisions, but that does not give them standing to interfere with an approved class settlement that did not adversely affect their interests.

II. THIS CASE DOES NOT PRESENT THE ISSUE OF WHETHER UNNAMED CLASS MEMBERS WHO ARE BOUND BY THE SETTLEMENT HAVE STANDING TO APPEAL

Petitioners argue that this case should be heard because it presents an issue on which the circuits are divided: whether unnamed class members have standing to appeal a class determination. That is not the issue before the Court. The petitioners are not unnamed class members governed by the class settlement, they are former class members not covered by the settlement. The lack of jurisdiction in this case is clear because the judgment entered does not affect the interests of the petitioners.

The decisions denying standing to unnamed class members provide support for the dismissal below. One of the primary rationales for denying standing to appeal to

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[2] That petitioners are willing to jeopardize a settlement accepted by class representatives and class members because they think they would make more money as class representatives than as class members, calls into question whether petitioners could ever fully and adequately represent the interests of the class as required by Fed. R. Civ. P. 23(a)(4).

unnamed class members is that they have the option of opting out of a settlement if they disagree with the result. Guthrie v. Evans, 815 F.2d 626, 627 (11th Cir. 1987). One of the advantages of class litigation is resolution of issues for a large group of people in one action. Allowing class members to appeal defeats that purpose. Croyden Associates v. Alleco, Inc., 969 F.2d 675, 678 (8th Cir. 1992), cert. denied, 113 S.Ct. 1251 (1993). These rationales support the dismissal of the appeal in this case. Allowing the petitioners, who have no stake in the settlement, to attack it on appeal defeats one of the main purposes of the class action mechanism.

Dismissing the appeal in this action was not, as the petitioners argue, an extension of Marino v. Oritz, 484 U.S. 301, 304 (1988); rather it is an obvious and well settled result of similar reasoning. In Marino the non-parties were arguably adversely affected by the consent decree they sought to appeal, but had not intervened in the action. Here the petitioners chose to take themselves out of the class so that they would not be adversely affected by the consent decree. Their opting out also deprived them of standing.

CONCLUSION

The petitioners' appeal was properly dismissed by the Eighth Circuit Court of Appeals because they have no standing to challenge approval of a settlement to which they are not parties.

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Respectfully submitted,

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